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LIMITATION LAW AND QUALIFIED OWNERS.

[VIDYA VARUTHI SWAMI'S CASE, I. L. R. 44 Mad. 831 SUBBAYYA PANDARAM'S CASE, I. L. R. 46 Mad. 751 ; MADHAVA ROW *v.* RAGHUNATH, I. L. R. 47 Bom. 798 ; NYNA PILLAI MARAKAYAR *v.* RAMANATHAN CETTIAR, 46 M. L. J. 546.]

The decisions of the Judicial Committee in *Gnana-Sambanda* v. *Velu Pandaram* (1) and in *Abhiram Goswami* v. *Shyama Charan Nandi* (2) had to be followed by a re-adjustment of the course of decisions in this country as to the application of the rules of limitation and prescription to possession held under invalid alienations by holders of religious or secular offices. The recent pronouncements noted at the top of this article are likely to call for a further re-adjustment of this line of cases.

For convenience of discussion, the relevant decisions may be classified under certain heads, *e. g.*

(1) those where the question related to the possession of the office itself and (2) those where the claim was only in respect of the properties ; or again (*a*) those in which the possession of the office or the properties had been taken without any colour of title and (*b*) those where the possession had passed under an invalid alienation. Cases of invalid alienations of property will again group themselves under sub-heads according as the alienation was absolute (as by way of sale, gift, exchange) or limited (as by way of lease, usufructuary mortgage, etc.) or according to the exact legal position of the alienors, whether they were

1. (1899) I L R 23 M 271. 2. (1909) I L R 36 C 1003 19 M L J 530(PC)

bare trustees or had beneficial interests in the property alienated, whether the alienation had been prohibited by statute or was only voidable by the successor and so on.

Without entering into details, it may be stated generally that the decision in *Velu Pandaram's case* (1) has been understood as laying down that whenever an alienation was *ab initio* invalid, the alienee's possession must from the outset be deemed to be adverse to the alienor as well as to his successors. A similar principle had been laid down by a Full Bench of the Bombay High Court in *Radha Bai* v. *Ananta Rao* (3). The Judgment in *Abhiram Goswami's case* (2) indicated that in the application of this rule, an exception should be made in favour of certain cases where even if the alienation may be invalid as it stands, it may be good during the lifetime of the alienor so as to deprive the alienee's possession of an adverse character during that period. It was not then suggested that any distinction should be drawn between absolute alienations and limited alienations, except in so far as on the language of Art. 134 of the Limitation Act of 1877, it was held that it applied only to absolute transfers. This difference in scope between Art. 134 and Art. 144 was removed when in the Limitation Act of 1908, the language of Art. 134 was made more comprehensive. Whether Mahants or Matadhipathies can be regarded as trustees so as to bring their alienations under Art. 134 had not been clearly settled but no doubt was entertained as to the application of the Article to alienations by shebaits or temple trustees. Anyhow Art. 134 and Art. 144 had generally been regarded as between them producing the same result in all these cases.

Proceeding on the lines above indicated, the Courts in India had denied the claim of a fresh starting point for the successor in office in one class of cases (cf. *Pydigantam Jagannadha Row* v. *Rama Doss Patnaik* (4) ; *Neelachalam* v. *Kamaraja* (4*a*)) but admitted it in another. *cf. Mahomed* v. *Ganapathi* (5) followed in *Kamalathammal* v. *Krishna Pillai* (6). The distinction between the different classes of cases was elaborated in *Narasayya* v. *Venkataramana* (7), which related to a permanent lease by a temple manager.

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1. (1899) I L R 23 M 271. 2. (1909) I L R 36 C 1003 : 19 M L J 530 (P C).
3. (1885) I L R 9 Bom. 198.
4. (1904) I L R 28 M 197. 4. *a*. (1904) 14 M L J 438.
5. (1889) I L R 13 M 277.
6. (1910) 20 M L J 781. 7. (1912) 23 M L J 260.

When the Judgment in *Vidya Varuthi Swami's case*(8) put heads of Mutts and shebaits on the same footing as regards their legal title, a fresh basis of distinction was sought for. In 67 I. C. 401 Mr. Justice Das suggested that the true line of distinction is between cases where property is vested in the juridical person and those in which the title is in a mahant or a shebait with an obligation to apply the income for the purposes of the mutt or the idol. It is only in the former class of cases that according to him the alienee's possession can be regarded as *ab initio* adverse to the title of the juridical person.

In *Vidya Varuthi Swami's case*(8), the Privy Council addressed themselves both to Art. 134 and to Art. 144 of the Limitation Act. The argument based on Art. 134 was answered by holding that under the Indian Law the head of a mutt or a shebait or a Mutawalli is not ordinarily a trustee in the English sense nor can the property under his charge be regarded as conveyed to or vested in him within the meaning of S. 10 and Art. 134 of the Limitation Act. Dealing with the argument based on Art. 144, their Lordships observed that though the head of a mutt was ordinarily incompetent to grant a permanent lease of mutt properties, such a lease could enure for his lifetime and the lessee's possession could not therefore become adverse to the mutt till the grantor's death. They further held, *even as regards the successor,* that a receipt of rent by him under that lease can be properly referred to a new tenancy created by him and as it was within his power to continue such tenancy during his life, the lessee's possession would not become adverse even during such successor's lifetime. This statement of the rule in respect of leases has been emphasised in their later judgment in *Subbiah Pandaram* v. *Mahammad Mustapha Marcair* (9), but they hold that the same principle cannot be applied to a *sale* and that the vendee's possession must be held to be adverse to the institution from the outset. *Subbiah Pandaram's case* related not to mutt property but to an ordinary charitable endowment. And even in respect of it, their Lordships *assumed* that a permanent lease by the trustee may be good for his lifetime. The result would thus seem to be that except in cases falling under Art. 134 any succeeding office holder may repudiate a permanent tenancy created by a predecessor and sue for possession, however long the intervening period or even the number of successions may have been, if only the rent has all along been received.

8. (1921) I L R 44 M 831. 9. I L R 46 M 751.

More recently in *Naina Pillai Maracair* v. *Ramanathan Chettiar* (11) their Lordships have expressed themselves in the following terms. "In the case of a shebait a grant by him in violation of his duty of an interest in endowed lands which he has not authority as shebait to make may possibly under some circumstances be good as against himself by way of estoppel but is not binding upon his successors." This particular observation was not made with reference to a plea of prescription and it is not possible to gather whether the grant here spoken of was meant to refer only to limited alienations or was to cover even absolute transfers. Further there is nothing in the judgment to indicate the nature of the circumstances on which the estoppel may be founded. In *Magdalen Hospital* v. *Knotts* (12) Lord Cairns suggested that in the case of an alienation by the head of an Ecclesiastical corporation a personal estoppel may arise by reason of a personal interest. But it is difficult to see how in the case of shebaits as we ordinarily know them, such an estoppel can exist unless it be in those cases in which the so called shebait being himself a gurukkal or other temple servant has also a substantial beneficial interest in the income from the endowed property. If the mere fact of the trustee making an alienation is to be regarded as affording a basis for a personal estoppel, the decisions in *Damodar Das* v. *Lakhan Das* (13) and in *Subbiah Pandaram's case* cannot be justified in so far as they refuse to recognise the death of the defaulting trustee as the starting point for limitation for a suit by the successor to recover the property. Whether the trustee who has alienated the property in breach of trust can himself repudiate the alienation and sue to recover the property has been the subject of difference of opinion in this country. [*Cf.* the cases noticed in *Kasim Sahib* v. *Ekambara Iyer* (14]. But the general recognition of a disability in the nature of estoppel and a consequent validation of the transaction during the alienor's lifetime will to that extent overrule the distinction drawn in some of the Indian cases between alienations by heads of mutts and transfers by shebaits or temple trustees. In *Abdur Rahim* v. *Narayana Das* (15) the question arose with reference to the position of a usufructuary mortgagee from a muttavalli, but

11. (1923) 46 M L J 546 (P C). 12. L R 4 A C 324.
13. (1910) I L R 37 C 885.
14. (1919) 37 M L J 698.
15. (1922) I L R 50 C 329 (P C).

the legal position was not discussed in view of the finding of fact that the mortgagee had not taken possession before twelve years from date of suit. *Cf. Jagga Rao Bahadur Garu* v. *Gonker Bibi* (16).

The language employed in the course of the Judgment in *Vidyavarudhi Swami's case*, led one to doubt whether the trustee of a temple or the shebait of an idol can be regarded as a 'trustee' even for the purposes of S. 92, C. P. Code. That provision had been adopted from Lord Romilly's Act and the section refers to any 'express or constructive trust created, etc.' It is thus possible to suggest that that provision was meant to apply only to trusts in the English sense of the term. The decision in *Nataraja* v. *Kailasa* (17) confirming the view of the Madras High Court that the head of a mutt cannot as such be proceeded against under S. 539 of the Code of 1882 gave further room for doubt. But in *Srinivasachariar* v. *Evalappa Mudaliar* (18), their Lordships have dealt with a suit against a dharmakartha on the footing that S. 92 is applicable, though there appears nothing in the case to distinguish his tenure of the properties there in question from that of trustees or managers in temples generally.

In the case of service inams, the trend of Indian decisions hitherto had been to draw a distinction between alienations which are absolutely void and those which are only void as against the alienor's successor and to hold that in the former case a prescriptive title can be acquired by twelve years' possession from the date of the alienation. On this footing, it was laid down that as the inam was generally held by the office-holder for the time being as remuneration for his services, any alienation by him can *prima facie* enure for his lifetime and the alienee's possession will become adverse only after the alienor's death or cession of office. But where the alienation had been expressly prohibited by statute or the prohibition rested on grounds of public policy, the alienation was held to be *ab initio* void, so as to support a claim of adverse possession in the transferee from the outset. Attempts have been made in recent years in Madras to question this line of decisions but with no success [*Cf. Dhanushkotirayudu* v. *Venkatarat-*

16. (1923) 17 L W 521.
17. (1920) I L R 44 M 283 (P C).
18. (1922) I L R 45 M 565 (P C).

nam (19), *Kuppuswami Mudaliar* v. *Samia Pillai* (20), *Majavathi Alli* v. *Musafar Alli* (21.]). The decision in *Madhavarao Wamen* v. *Raghunath Venkatesh* (22) may, however, lead to a change. Their Lordships' Judgment dealt with *Watan* lands and it suggests that as their alienation had been prohibited in the interetss of the state, the alienee cannot acquire a title by adverse possession. This probably rests on the theory that a service inamdar has no *estate* in the inam lands but merely holds and enjoys them as an adjunct to his office and by way of remuneration for his services and that the alienee's possession can, if at all, be adverse only to the title of the state. This will explain their Lordship's reference to the necessity of the presence of the Secretary of State in a suit raising such a claim; and it may also be noted that the decision in *Venkata Jagganatha* v. *Veerabhadrayya* (23) rests on some such view as to the true nature of service inams. [See per Wallace, J. in S. A. No. 1752 of 1922, where the learned Judge holds that the decisions in 14 M. L. J. 438 and *Dhanushkotirayudu* v. *Venkataratnam* (19), have been impliedly overruled by the Judgment in *Venkata Jagannatha* v. *Veerabhadrayya* (23)].

In*Madava Row's case* (22) also the Judicial Committe advert to the distinction between a claim of absoulte right by the transferee and a claim by way of permanent tenancy and they say that 'neither the defendants nor their predecessors in title could have acquired any title to a permanent tenancy in the lands by adverse possession as against the *Watandars* from whom they held the lands.' It has hitherto been assumed in this country that even a tenant can acquire a permanent tenancy right by adverse possession, though it has not been easy or possible to define the circumstances under which the possession of a tenant may acquire an adverse character. [*Cf.* I. L. R. 37 M. 1.]

But the operation of the law of prescription would seem to be almost completely excluded in such cases by the following observation in *Naina Pillai Maraicair's case.* "No tenant of lands in India can obtain any right to a permanent tenancy by prescription against his landlord from whom he holds the lands." We do not know if this is meant to apply only to cases in which a tenant lawfully enters into possession under a

19. (1919) 38 M L J 320. 20. (1921) 42 M L J 1.
21. (1923) 45 M L J 791. 22. (1923) I L R 47 B 798 (P C).
23. I L R 44 Mad. 643.

lease from year to year or for a definite term and later on asserts a claim of permanent tenancy or even to cases in which he takes possession under a lease which *ex facie* purports to create a permanent tenure but which is as a matter of law invalid or inoperative. (*Cf.* I. L. R. 25 Mad. 507). Nor is it clear whether the dictum can be applied even to a permanent lease falling under Act 134. We may point out in this connection that in *Magdalen Hospital* v. *Knots* (12) it was indicated by Lord Selborne that even where a lease is invalid *ab initio*, if the lessee entering under it goes on paying rent the law will presume a tenancy from year to year from the receipt of the rent. But in *Narasayya* v. *Venkataramana* (23), the Court refused to follow that view on the ground that it was not concurred in by the Lord Chancellor and Lord Gordon and that it was opposed to the decision in *Attorney-General v. Davey* (24). The statement as to the opinion of the Lord Chancellor and of Lord Gordon seems to us mistaken, as both of them expressly make a point of the fact that in the case before them, the transferee did not pay rent or in any other way enter into the relations of tenants. And that is how the effect of that decision is stated in Darby and Bosanquet's treatise. As to *Attorney-General* v. *Davey* (24), it has evidently to be understood as applicable to cases falling within the principle of Art. 134.

SUMMARY OF ENGLISH CASES.

CHILLINGWORTH *v.* ESCHE, (1924) 1 Ch. 97.

Vendor and purchaser—Agreement to sell—Deposit — Purchaser finally refusing to complete sale—Recovery of deposit.

A certain person entered into an agreement with another to purchase freehold land " subject to a proper contract being prepared by the vendor's solicitors. A portion of the consideration fixed was paid as deposit and in part payment. The purchasers finally refused to complete the transaction and claimed back the deposit amount. *Held* by the Court of Appeal reversing the decision of Astbury, J., in (1923) 1 Ch. 576 that the original agreement was only conditional and until the for-

12. L R 4 A C 324. 23. (1921) I L R 44 M 643 (P C).
24. (1859) De G & J 136.

mal contract was signed the parties were not bound by it, and as such the deposit amount could be recovered.

Per Pollock M. R.—The word "proper" must be given its full meaning and the intention of the parties was that the full conditions should be considered in a further contract and until that further contract was executed there should be no binding contract for the purchase of the property.

Per Waintgton L. J.—Where there is no binding contract and the whole matter is left indefinite, it is impossible to say the purchasers pay the deposit as a guarantee to carry out the bargain, when by the document they have entered into , they have not bound themselves to carry out any bargain. Case Law reviewed.

DODD *v.* AMALGAMATED MARINE WORKERS' UNION, (1924) 1 Ch. 116.

Inspection— Righ of —Books and accounts of Trade Union —Help of assistant —Case of companies and partners..

A member of a Trade Union has a right to inspect the books and accounts of the Union and may in proper cases employ an agent such as an accountant to assist him. This principle is not confined to Trade Unions, but applies to members of companies, partners and others.

The onus of establishing that the help of an assistant is sought for *mala fide* is upon the persons who resist inspection. (1909) 1 Ch. 561 followed.

In re WHISTON WHISTON *v.* WOOLLEY, (1924) 1 Ch. 122.

Will—Construction— Gift to children —Nomination — Death of one at the time of will—Effect —Mistake as to number of legatees —Rules relating to.

A testator had three children by the first wife and three children by the second wife. He made a general bequest of all his real and personal estate excluding what he had inherited from his second wife to all his six children in equal shares and out of the property he inherited from his second wife, he gave small legacies to his children by the first wife and the rest he directed to be divided among the three named children by her. One of

these latter had been reported missing during the war, but the testator refused to believe it. It was subsequently proved he had died before the date of the will.

Held on a construction of the will the third share of his mother's estate lapsed and fell into the general residue and did not devolve on his two brothers and sisters. Distinction between a bequest to a class and a bequest *nominatim* pointed out. (1908) 2 Ch. 190 ditinguished.

As regards the one sixth share of the testators' real and personal estate of the testator, that must be deemed undisposed of, the real estate going to the testator's heir at law and the personalty to his next of Kin.

22 Ch. D. 111 is a decision on a particular will and lays down no principles of general applicability.

Per Sargant, L. J.—*Quaere* whether 22 Ch. D. 111 is correctly decided ?

KRUSE *v.* SEELEY, (1924) 1 Ch. 136.

Money-lender—Promissory note—Heavy bonus taken — High rate —Pledge of furniture—Court's power to relieve against terms —Money-lender's Act S. 1.

A lady on receiving £ 300 from a money lender executed to him a promissory note for £ 500, the amount being payable in 24 monthly instalments. Interest was 60 per cent. and if default was made in any payment the whole would become payable at once. As security, the money-lender took possession of furniture which had been insured for £ 500 and which was purchased a year before for £ 1,750. If payments were duly made the average rate of interest would work out at 82 1|2 per cent, while if there was default in the 1st instalment, the rate of interest would work out at something like 100 per cent. The lady made default in the first payment and came to Court asking for relief against the terms of the contract. *Held* in the case of a person heavily in debt resorting to a moneylender, the rate of 82 1|2 per cent. would not be so excessive as of itself to make the contract harsh or unconscionable, if the loan had been made purely on personal security. But where it was adequately secured by the goods pledged, a rate of interest which might not have been regarded as excessive for a loan of personal security becomes outrageous and extortionate for an advance upon good security. The transaction was unconscionable and the Court directed the contract

to stand as security for £ 300 with interest at 15 per cent. and the plaintiff was also directed to pay the costs of the storage of furniture and of insurance.

HAVANA CIGAR AND TOBACCO FACTORIES, LTD. v. ODDENINO, (1924) 1 Ch. 179.

Trade Name—Infringement—Word signifying brand and size—Seller to clear up ambiguity.

In the cigar market the term "Corona" used to imply cigars manufactured by a particular company, later on it also became to denote cigars of a particular size and shape. A hotel keeper when asked by one of his customers for a "Corona Cigar" supplied one of the Corona size and shape but of some other brand. In a passing-off action for restraining him from doing so, the defendants contended that the word being ambiguous in its meaning, it was not for them to clear up the ambiguity. *Held*, as the evidence showed that customers when they used the word, intended to signify the brand and not the size or shape, an injunction should issue. The duty in such a case is on the hotel-keeper to ascertain what was actually meant by the order or to indicate by word of mouth or otherwise that what was supplied was not a cigar of the Corona brand.

BRITISH THOMPSON-HONSTEN CO., LTD. v. BRITISH INSULATED AND HELSBY CABLES, LTD., (1924) 1 Ch. 203.

Evidence—Admissibility—Oral testimony in prior action—Admission—Difference between documents and oral evidence.

In a prior litigation, the plaintiff in order to prove a certain contention of his cited certain witnesses who gave evidence in his favour. In another action by the same plaintiff against other defendants the latter claimed to put in the oral evidence in the earlier case as amounting to *prima facie* evidence binding on the plaintiff. *Held*, it was not admissible as evidence. There is a distinction in this respect between oral evidence and written evidence; for in the latter case, a party knows exactly what evidence he is letting in and will be bound by it, while in the former case he does not know exactly what a witness is going to depose to.

Case-law referred to,

THE KING v. ELECTRICITY COMMISSIONERS EX PARTE LONDON ELECTRICITY CO., LTD., (1924) 1 K. B. 171.

Writs of prohibition and certiorari—When can be issued and to whom—Scheme to come into effect after approval by Parliament—Distinction between the two writs.

Under the Electricity Act, schemes were to be proposed by Commissioners and after confirmation by the Minister of Transport to be laid before both Houses of Parliament and approved by resolution and then only to come into force. One such scheme being proposed certain persons affected by it applied for writs of prohibition and *certiorari* on the ground the scheme was *ultra vires* but the Divisional Court dismissed the same on the ground the applications were premature as it could not then be predicted the scheme would be sanctioned by Parliament. The Court of Appeal found the scheme was *ultra vires* and as such it was never too early for a writ of prohibition to issue, as otherwise much waste of time and money would occur. The fact that the scheme becomes law only on being approved by Parliament does not oust the jurisdiction of Civil Courts in inquiring into the validity of the same.

A writ of prohibition is a judicial writ issuing out of a Court of superior jurisdiction and directed to an inferior Court for the purpose of preventing the latter from usurping a jurisdiction into which it is not legally vested. As statutory bodies came into existence exercising legal jurisdiction, issue of such writs came to be extended to such bodies.

Per Atkin, L. J. :—Prohibition restrains a tribunal from proceeding further in excess of jurisdiction ; *certiorari* requires the record or order of the inferior Court to be sent up to the King's Bench Division to have its legality inquired into. There is no difference in principle between the two except that the former may be invoked at an earlier stage.

NUMAN *v.* SOUTHERN RAILWAY CO., (1924) 1 K. B. 223.

Fatal accident—Railway company—Death of passenger —Contract fixing liability—Dependants if bound by—Fatal Accidents Act (1846).

A railway passenger who was holding a workman's ticket was run over and killed. One of the conditions of the ticket was the liability of the Company was limited to a sum not exceeding £ 100. His widow brought an action under the Fatal Accidents Act for compensation. *Held,* her claim was

not limited by the agreement entered into by her husband and a Court can grant her more, if the facts justify it.

The causes of action of the dependants of the deceased is a new and distinct cause of action in respect of which damages are estimated on an entirely different basis.

THE KING *v.* SUSSEX JUSTICES : EX PARTE MC CARTHY, (1924) 1 K. B. 256.

Criminal Law—Possibility of bias—Course of trial—Presence of Justice's Clerk at consultation—Professional connection with one of the parties—Effect.

As a result of a collision between two motor cycles, a civil action ensued, and at the same time a criminal prosecution was launched at the instance of the Police. The person who acted as Justice's clerk in the criminal proceedings belonged to a firm of Solicitors who were actig on behalf of the plaintiff in the civil action. In the normal course of things, the Justices after hearing the evidence retired for consultation and according to the usual practice the Justices' clerk went along with them with the notes of evidence, but it was subsequently proved he did not take any part in the consultation. The trial ended in a conviction and then a writ of certiorari was taken out to quash the proceedings. *Held by Lord Hewart C. J.* It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. The position of the clerk's firm in the civil proceedings made it impossible for him to discharge his duties properly in the criminal proceedings and in the absence of waiver of irregularity, the conviction should be quashed.

SHRAGER *v.* BASIL DIGHTON, LTD. AND OTHERS, (1924) 1 K. B. 274.

Jurisdiction—Objection to—Waiver—Effect

An action before a Judge was referred for trial to the Official Referee. Under O. 36 of the Rules of the Supreme Court, it was to go to one of the Official Referees in rotation, but it was actually taken up and tried before a Referee who would not come in by rotation. The facts became known to

the parties at some stage of the trial or other, but in spite of it, the case was allowed to proceed. *Held* the irregularity had been waived by the parties and did not vitiate the trial.

Per Bankes L. J. —The Rules of the Supreme Court relating to the distribution of business are rules of procedure and do not touch the question of jurisdiction at all.

WILCOCK *v.* PINTO AND COMPANY, (1924) 1 K. B. 304.

Income Tax—Exercising trade within the United Kingdom—Non-resident persons —Brother arranging business — If taxable.

A firm of cotton merchants in Egypt used to sell cotton in Manchester through a certain person. He used to forward applications to Egypt and if accepted to exchange documents and secure his commission. Goods used to be shipped C. I. F. from Egypt and payments made by bills drawn on the buyers and discounted in Egypt. The firm were under no obligation to do business through that individual nor was he prevented from doing business for others. *Held* his position was only that of a broker and the Egyptian firm could not be said to be exercising a trade within the United Kingdom in order to be taxable. It cannot be laid down that whenever a contract is made in England, trade is necessarily exercised there.

JOTTINGS AND CUTTINGS.

The Courts and Deportation Orders :—It requires a strong case to rouse the Courts from the apathy which seems to have fallen on them in dealing with Home Office orders for deportation, and many had hoped that the appeal of the 'blameless wife' (against whom no offence of any kind was alleged) with her British-born child would have afforded the occasion for a reconsideration of the attitude of impotence adopted towards these administrative orders. In view of previous decisions, it was excusable, perhaps, for the Divisional Court to decline, of its own motion, to issue the writ of *habeas corpus* which was applied for by the aggrieved woman to stay the carrying out of the order for her expulsion. But it is disappointing that the Court of Appeal (Bankes, Warrington, and Scrutton, L. JJ.) should have not only declared that 'it

was impossible for the Court to interfere with the discretion of the Home Secretary in the matter,' but should actually have gone out of its way to suggest an improvement of the form of the order, which was on the face of it irregular, as it did not state any ground for the deportation, so as to bring this—and any other—case within the statute (*The King* v. *The Home Secretary ; Ex parte Eva Bressler ;* March 14). One would have thought that on an application affecting individual liberty such an irregularity—the omission of the material words 'conducive to the public good' introduced by the latest Aliens Order [Art. 12 (6.c)]—would have been seized on by the Court as providing the necessary opportunity for administering a judicial check to the arbitrary exercise of these powers. The opposite course, however, has unfortunately taken, and it will remain for a higher tribunal—we understand that the appeal is to be carried to the House of Lords—to deal with the whole matter, and to say finally whether the Rule of Law has been displaced by a Rule of Police in all these cases. There is authority, if needed, the other way. In *Ex parte Sacksteder* (1918), for instance, Pickford, L. J., said, " I am not prepared to say that in every case where there is an order of detention or imprisonment the Court is entitled to go behind that, and see what the motives for making that order were ; but I certainly am not inclined to say that in no case can the Court go behind an order which is, on the face of it, valid.' What would he have said to a case like this, where the order was, on the face of it, irregular, and where the effect of it was not mere detention or custody, but complete outlawry ? If the present ruling stands it would rather seem that our whole procedure in extradition cases, which is so strictly applied for the protection by law of persons charged with crime, is rendered nugatory, for the simple decree of the Home Secretary will be sufficient, and there is no need for any judicial investigation. But the Courts have not gone so far yet in the abandonment of their jurisdiction ; and it would be strange indeed if, where aliens charged with no offence are concerned, a different rule should be allowed to be established.

The Law Journal, 160.

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A Wife's Right to Expel her Husband :—Probably no decision of recent years has caused such surprise, and has seemed, in a sense, so startling ,as that in *Shipman* v. *Shipman*, by which Russell, J., and subsequently the Court of Appeal

(March 19), held that where the house forming the matrimonial home happens to belong to the wife as her separate property, she can order her husband to leave it. The action was based upon section 12 of the Married Woman's Property Act, 1882, which gives to a married woman 'against all persons whomsoever, including her husband,' remedies for the protection and security of her separate property as if she were a *feme sole,* and although the Court pointed out that the husband's conduct had been bad, and such as would enable the wife to maintain a case against him in a matrimonial suit, and further, that the order was only an interlocutory one, yet it seems from the judgments that these factors, though influencing the Court in granting an injunction to restrain the husband from entering the home, were not absolutely essential to the success of the wife's application. Apparently, an English married woman's house is her castle, and she can order her husband to leave it, or let down the portcullis against him, whenever she chooses ; and this power in her is rendered all the more remarkable by the fact that the husband has no corresponding power to protect *his* home against an undesirable wife. It is true that, in giving judgment in the Court of Appeal, the Master of the Rolls emphasised the duty of husband and wife to live together, and that he associated himself with certain remarks of Lord Justice Cotton in *Symonds* v. *Hallett* (24 Ch. D., at p. 351), in which it was said that though a woman might be a *feme sole* as regards her property, yet she still had a husband ; but those reminders of the sanctity of the marriage contract, however admirable in themselves, do not seem to indicate any direct bar to the right of the wife to enforce her legal rights under the statute. 'Is the husband,' said Lord Justice Cotton, 'to be considered a stranger because the property is vested in her for her separate use ?' As regards his right to live in her house, the section would indicate that he is. The days when the wife was said to be the husband's chattel have long since gone by. Apparently there are now cases in which he must study to be circumspect and obliging if he wishes to remain her lodger. —*Ibid, p.* 176.

Professional Discipline and Restraint of Trade :—An important case in the Privy Council last week (March 26), *Thompson* v. *New South Wales Branch of the British Medical Association,* raised the question whether certain regulations of the British Medical Association operated in restraint of trade,

and were void. In particular a rule was attacked which provided that if a medical practitioner was declared by the Council to have been guilty of conduct detrimental to the honour and interests of the profession, and which was calculated to bring it into disrepute, no member of the Association should consult with him or extend professional recognition to him in any other form until it should have been otherwise decided by the Council. The Privy Council, however, declined to entertain the view that this rule did operate in general restraint of trade. It could only coerce—if it coerced at all—members of the Association. It could not prevent persons who never had been members of the Association, or had ceased to be members, meeting in consultation a medical practitioner whose conduct the Council declared had brought him within the rule. Further, the implied contract between the members and the Association that they should observe the rule was, under the principle of the *Mogul Case* (1891) 61 L. J., Q. B. 295, a lawful one. The object of the rule was not to penalise or injure any person, but solely to keep up the discipline and morale of the members and to protect the interests of the Association. If incidentally a member of the profession against whom it was brought into operation was injured by action taken solely with the lawful purpose of protecting the interests of the Association, the injury gave him no cause of action.*Ibid, p.* 188.

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The Abolition of Capital Punishment :—The Home Secretary received last week a deputation of members of a number of societies, who placed before him various considerations and statistics in support of the abolition of the death penalty in this country. The societies represented were :— The Committee for the Abolition of the Death Penalty ; the Society of Friends ; the Women's Co-operative Guild ; the Howard League for Penal Reform ; the Central Council of Societies working for Abolition of Capital Punishment Manchester Society for Abolition of Capital Punishment ; Women's Freedom League the British Section of the Women's International League for Peace and Freedom. The Home Secretary, in thanking the deputation for their statement, promised that what they had said would be brought before the Government in an appropriate form before any decision was reached by the Government on the question of abolition. He pointed out, however, that any Government must take public opinion into account, and that, so far as his long

Parliamentary experience went, there was little evidence of any general public desire for abolition, the subject not having been debated for many years. He also pointed out that before a Government could recommend an alteration in the law they would have to consider very carefully what satisfactory alternative punishment they could properly suggest. —*Ibid, p.* 209.

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Lord Darling on the Death Penalty.—Since the Home Secretary received the deputation Lord Darling, who when a judge of the King's Bench tried many of the most memorable murder cases of the past 26 years, has contributed an article to the *Evening News* stating his views on capital punishment for murder. He writes 'For my own part I cannot agree with those who hold that what they call a " final " sentence of penal servitude for life is as likely as the high probability of hanging to turn a man aside from murder. There is no finality but death—even if that be final. Most of us believe it is not so, and no one can be absolutely certain that it is. *Chi lo sa ?* It is incapable of proof. But of imprisonment, be it in Wormwood Scrubs or Portland, the worst is easily ascertained. These abodes may not be those of the best ascertained. These abodes may not be those of the best, but they hold no unknown terrors. But who, meditating murder in a land where it is punishable with death, can fail to have some such thoughts as these

" To die—to sleep—
To sleep ! Perchance to dream ; eye, there's the rub;
For in that sleep of death what dreams may come,
When we have shuffled off this mortal coil,
Must give us pause."

* * *

Yes—*must* give us pause. And who shall say how that hesitation shall end ? The knowledge that the law pushes the malefactor without delay over and beyond that bourne cannot but have an effect upon the mind different from the fear of a prison whose gate may some day be opened. Further a prison may well appear very tolerable to those who would not fear a course of lectures, such as many willingly support at the Royal Institution and elsewhere Guarded as the penalty is, I am convinced that death is a justifiable and expedient punishment for the crime of wilful murder.

CONTEMPORARY LEGAL LITERATURE.

A writer traces the history of the process of attachment for contempts out of Court in the *Law Quarterly Review* for January, 1924 under the title *The Writ of Attachment.* The practice in this respect is peculiar in English Law, as it is a form of proceeding which involves penalties without a trial by Jury. In an early case *Rex* v. *Almor,* Wilmot, C. J. said "They are only pntting the complaint into a mode of trial where the party's own oath will acquit him, and in that respect it is certainly a more favourable trial than any other ; for he cannot be convicted if he is innocent, which by false evidence, he may be by a jury ; and if he cannot acquit himself he is but just in the same situation as he would be if he were convicted on an indictment or an information. For the Court must set the punishment in one case as well as the other ; they do not try him in either case ; he tries himself in one case and the jury try him in the other." The writer objects to this that though an innocent man under examination upon attachment may acquit himself by his oath, he is still liable to be prosecuted for perjury, and may be convicted by false evidence in that case. See *Wright* v. *Mason* (1). He is then worse off, as the writer points out, than the man who is convicted by a jury of contempt in the first instance, for, in effect, he is found to have committed a double offence. He quotes the opinion of Wilmot, C. J. himself in another (*habeas corpus* case) when he said : "The clearest and most undoubted proof in the law is the verdict of a jury."

The writ of attachment is itself of ancient origin. From the time of Henry II it was the means of bringing a man before the Court for trial. In civil cases and petty criminal cases the defendant was attached by pledges, or by his goods, or by distress. In case the defendant's appearance in petty criminal cases could not be secured by this means, and in cases of felony and major offences, the defendant was brought to trial by the attachment of his body. Attachment was merely a process the process by which he was brought up for trial in the ordinary course of law ; trial and sentence or judgment followed.

But the feature in contempt proceedings which does not stand on immemorial usage is that examination of the accused (and not a trial) was made to follow attachment. The Law

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1 (1723). 8 Mod. 109.

has however been established at any rate from Chief Justice Wilmot's time that all kinds of contempts can be punished by summary process. The statutory jurisdiction for attachment, examination on oath, committal and fine, in cases of contempt, was first conferred, and then only in certain specified cases by the Statute. (43 Eliz., C. 6). The Statute provides that, where a sheriff makes a warrant to summon, arrest, or attach a person, not having a writ authorizing the same, the person making the warrant, and the procurers thereof, shall be brought before the Justices of Her Majesty's Courts at Westminster or elsewhere by attachment and be examined on their oaths ; and if the offence be confessed or proved by witnesses, the offenders shall be committed to gaol until they have paid to the party grived £ 10 and his costs and damages, to be fixed by the Judge and £ 20 to Her Majesty. It will be observed, continues the writer, the power to commit is limited by the right of the prisoner to his discharge upon payment of the damages, costs and fine. The Statute seems to negative the existence of a general power by common law to fine and imprison without limit of amount or time, even a sheriff, who is an officer of the law, and *a fortiori*, a stranger.

The Star Chamber claimed jurisdiction, in the reign of Elizabeth, to correct by summary process contempts out of Court, whether committed against its own or any other Court. About the same time summary procedure was attempted to be introduced in a case of contempt out of Court in the King's Bench. But that such procedure was not adopted by the Court of Common Pleas is shown by a remark of Anderson, C. J. in *Dean's Case* (3), where he says : ' A man may be imprisoned for a contempt done in Court, but not for a contempt out of Court. ' Sheldon's Dictum in (1629) 3 How. State Trials 267, is to the same effect, that a contempt committed out of Court is punishable, like any other trespass, only after conviction in the ordinary course of the law.

Then the writer proceeds to examine in detail the origin and growth and nature of writs of attachment in general.

The writer thinks that upon the words of the Statute of Westminster the second (1285) which provides for punishment by imprisonment by the Sheriff by persons resisting execution of process, the power of the Sheriff was only to commit resisters by way of remand to await the King's direction. It would be unreasonable to support that the sheriff can pronounce sen-

3. 41 Eliz. Cro. 689.

tence, without previous trial, on the resisters of his bailiffs, of whose guilt he has not visible proof, whereas in the case of those who resist the sheriff himself he is to certify them to the King's Court for trial (as provided by that Statute). The Statute directs the *punishment* of bailiffs by the sheriff ; but only the restraint of resisters.

Whatever the origin may be, the summary process has now been firmly established. The accused however, is not arrested in the first instance. The question of 'guilty' or 'not guilty' of the contempt alleged is decided upon the application for leave to issue the writ, so that if the Judgment is 'guilty' the Court directs the issue of a writ requiring the offender to answer touching a contempt alleged against him, but in respect of which, in fact, he has already been convicted and sentenced.

Contempts committed in Court have long been punished summarily. And the disciplinary jurisdiction of the Court over its own officers stands upon a separate footing. The jurisdiction to punish contempts by strangers out of Court, such as libels on Judges or comments on pending proceedings calculated to obstruct the course of justice, has been of recent and gradual growth.

[See also 'Process of Imprisonment at Common Law, (1923) L. Q. R. XXXIX, 46.)]'

BOOK REVIEWS.

SARKAR ON EVIDENCE by *S. C. Sarkar,* Second Edition, 1924. *M. C. Sarkar and Sons, Calcutta.* Rs. 15.

This is the second edition of the well-known commentary on the Indian Evidence Act. This edition is long overdue and the profession has for sometime been looking forward for its publication. We have gone through some portions of the book carefully and would say with confidence that this is the most exhaustive commentary on the Act. The most authoritative treatise on the Indian law on the subject is, of course, that of Mr. Amir Ali and Sir John Woodroffe and this edition of Mr. Sarkar's work does not, in our opinion, suffer in comparison with it. We should however point out certain features of this work which render it more useful to busy practitioners. The references are not given only to the cases appearing in the

authorised reports or in some of the other leading journals. On the other hand no case of any importance on the subject appearing in any journal is omitted ; and this is an advantage which a lawyer will appreciate very much. Again there is a danger to which books which note all cases are susceptible of, which is that they will descend to the level of a digest. This danger has been altogether avoided and the decisions are critically noticed. We shall in this connection only refer to the state of the law under S. 92 of the Act on the subject whether evidence of conduct is admissible to vary the terms of a written contract. The divergence of judicial opinion on the subject since *Balkishen Das* v. *Legge* down to 1924 and the points of difference have been carefully and luminously brought out by the author. We do not quote other instances only because it is unnecessary to multiply them. The principles of the law are very clearly stated by the author in his work and it is needless to go further than to say that even the first edition of the book has commended itself to the approbation of such a jurist as Lord Shaw of Dumfermline. We cannot justly conclude this review without drawing attention to the foreword written by Mr. Justice Walsh which gives valuable suggestions to the lawyer on various points of practice underlying the law of evidence, which will amply repary careful study. We feel sure that the merits of the work are such that it will find its place into the library of every lawyer and judge.

STUDENTS' HANDBOOK OF ROMAN LAW by *A. G. Kulkarni*, 1924.

This book which is mainly intended to meet the requirements of the University student sets out the principles of Roman Law in such a way as would be easy for him to obtain a clear idea of the subject. The writer has even arranged in their proper places the important questions at the law examinations of Bombay and Calcutta and has used them to serve as marginal headings. We believe that this book will greatly facilitate the understanding of the subject and be a great help to the students preparing for the examination.

[END OF VOL. XLVI.]